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DISCUSSION RESPONSE

Is civilian harm tracking a sensible idea?

BILL BOOTHBY — 14 January, 2015



A response to Ellen Policinski

Ellen Policinski makes a persuasive case for the more widespread and systematic employment of civilian harm tracking. Let me tackle the matter from a different angle. The AP I article 57(1) obligation to take constant care would seem, on any sensible interpretation, to imply a requirement to identify what is causing any level of incidental civilian harm, not just excessive civilian harm, during military operations. Only if you have awareness of what causes civilian harm can you take precautionary action to seek to prevent it. It is likely that the strategic purpose of an operation to influence the adverse leadership's or population's 'will' in a predetermined direction would be

impeded were there to be a perceived lack of military concern as to its suffering. While it would probably need to be understood and accepted that data derived from civilian harm tracking would not be made publically available, letting it be known that such an activity into an internal, military 'lessons learned' process might yield surprising dividends in the form of respect from certain quarters of an adverse population accustomed to more contemptuous treatment by its own leadership.

Is civilian harm tracking practically deliverable?

To avoid suggestions of mere window-dressing, the process would need to be undertaken in good faith and to be seen to give rise to altered behaviours where demonstrably warranted and clearly affordable. Tactical circumstances will determine the extent of the measures that can realistically be taken to secure information to inform the process and are also likely to influence the accuracy of the data collected and thus the reliability of any conclusions that can be drawn from it.

What if civilian harm tracking has resource implications?

To balance the discussion, it must be recognised that in a defence environment in which spending is constrained, even severely constrained, anything which appears to require either unfunded expenditure or unbudgeted additional manpower is likely to be greeted with a certain lack of enthusiasm. Convince military planners, however, that the activity can positively contribute to achieving desired operational outcomes, and while a bottomless pit of funding will certainly not appear, at least the suggestion will receive some attention.

Civilian harm tracking and fault detection

Another aspect of the matter that we should also consider is the possibility that by obtaining data soon after the events in question, patterns of misbehaviour in either troops or weapon systems can be identified promptly. Where the apparent fault lies with personnel, the relevant units can be identified, targeted training and/or disciplinary action can be considered and command responsibility and general discipline can be reinforced. Where the apparent fault lies in defective weapon system performance, the fault(s) can be noted, suitable repairs or modifications can be thought out and applied, and adjustments to the methods of use can, to the necessary extent, be considered, refined and implemented.

Other factors can of course manifest themselves in increased civilian casualties. These might include unreliable human intelligence data, inaccurate collation or interpretation of intelligence, errors in the loading of targeting data and poor performance of sensors, fear, confusion, and deception by the adverse party. Whatever the particular cause, the military interest lies in seeking to ensure that future operations are as discriminating as possible, that future targets are prosecuted reliably and with precision. Accurate civilian harm tracking might support the achievement of such objectives.

Is there a PR dimension?

In recent years it has become increasingly apparent that legal proceedings can follow attacks in which civilians suffer harm. These proceedings may for example involve allegations that there have been human rights breaches and

may be before national or international courts. The timely collection, collation and interpretation of civilian harm data and the timely implementation of such improvements in TTPs as are indicated by such data and associated information would tend to further support the contention that the armed forces do indeed take civilian harm seriously. Readers will appreciate that civilian harm is already taken most seriously by the armed forces of Western states. They should know that the most extensive and careful precautions are taken with a view to avoiding or minimising civilian harm and damage. They should also appreciate that total safety for civilians in an armed conflict, while a worthy objective, is likely to prove impossible to achieve in many, perhaps all, conflicts. It is possible that by undertaking civilian harm tracking, and by regularly reviewing its *modus operandi*, a military force can more directly demonstrate that this concern is being translated into relevant action.

But there is a potential drawback

The information that is collected will not all be accurate. It will by definition come from a variety of sources the reliability of which is likely to be variable. It may well not be known at the time of collection which information is right and which is wrong. However, those undertaking subsequent legal proceedings are likely to be keen to obtain the information derived from civilian harm tracking of a particular event and of relevant preceding and perhaps subsequent events. Freedom of Information requests, or enforced disclosure under court discovery procedures, may be expected to get such documentation into the public domain. Handling the controversies that are liable to arise from such disclosures may prove to be challenging in manpower and resource terms. It is possible that what

would start out as a commendable effort to monitor and thus minimise civilian casualties will provide yet another stick with which to beat the long-suffering military. It is suggested that military support for such a process will only be possible if safeguards are in place to prevent the process being high-jacked in such a way.

Conclusion

The conclusion seems to be that this is a process worthy of further careful consideration. If it can reduce civilian casualties in future operations it will be a worthy development indeed. The arrangements that are made must strive, however, to ensure that the process remains an aid, not an albatross, for commanders.

Bill Boothby is a retired RAF Legal Officer who is the author of books on Weapons Law, Targeting Law and the law relating to conflict in general. He is particularly interested in the law applicable to new technologies, such as cyber warfare and autonomous weapons. His most recent book is entitled “Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors”.

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ELLEN POLICINSKI

15 January, 2015 at 16:51 (Edit) — Reply

First of all, thanks to Bill Boothby for his thoughtful response. I'm happy to see this discussion continue. I would like to take the opportunity to briefly comment on the potential drawback Dr. Boothby identifies– that information gathered by a civilian harm tracking cell could ultimately be used against the warring party. Casualty tracking is simply an acknowledgement of the harm caused, and the tracking cell a central repository for the facts on the ground as they were known at the time. Even without a cell dedicated to this task, most militaries conduct investigations that already include much of the information that would be fed to the cell. The information can often be requested for public release, for example through a FOIA request in the U.S.

The data gathered in a cell provides a warring party with the ability to aggregate, analyze and understand the data – analysis of which may act as a catalyst for change. For

example, it is my understanding that there was not an uptick in litigation after the CCTC/CCMC was established in Afghanistan. Given the immunities States and their militaries usually benefit from during combat operations, it seems that the risk of increased litigation could be (and potentially already is) minimized. Although litigation certainly can't be ruled out as a challenge for any military operation regardless of whether there is a cell to gather and analyze data, it is my belief that the positive gains mentioned in both my and Dr. Boothby's articles far outweigh any possible negatives.

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